SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 781

CLAUDE L. KYLES,

Petitioner,

vs.

JAMES W. ELWELL & CO., a corporation, G. HEYN & SONS, and INTERSTATE CONTRACTING CORPORATION, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 8, 1961, which judgment dismissed petitioner-plaintiff's action for damages for personal injuries.

OPINION BELOW

The opinion of the Court of Appeals, set forth in the Appendix of this Petition at pages 1a-6a, is reported in 296 Fed. (2) 703.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

The opinion of the Court of Appeals was entered on December 8, 1961. The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTION PRESENTED FOR REVIEW.

Whether a stevedore may sue a ship owner for personal injuries sustained on board ship under the Merchant Marine (Jones) Act, Sec. 20, 46 USCA, Sec. 688.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

There are no constitutional provisions involved.

The two Federal Statutes involved are:

1. The Merchant Marine (Jones) Act, Sec. 20, 46 USCA, Sec. 688, is set forth on page 8a of the Appendix.

2. The pertinent portion of the Longshoremen's and Harbor Workers Act, 33 USCA 901, is set forth on page 9a of the Appendix.

STATEMENT OF THE CASE.

This action was brought in the District Court for the Northern District of Illinois, Eastern Division, for personal injuries sustained by plaintiff—a longshoreman—while working in the hold of a vessel on navigable waters, when a load of steel tipped and fell upon him.

The injury occurred on July 27, 1957, and the complaint was filed February 1, 1960. The complaint makes the owners of the vessel parties defendant and alleges that they maintained an unseaworthy ship, that they were guilty of various acts of negligence, failed to furnish plaintiff a reasonably safe place to work, and suit is brought not only for unseaworthiness, but directly under the Jones Act.

The Court sustained the motion for summary judgment filed by the ship owners. The motion proceeded on the theory that plaintiff's cause of action was barred by the Illinois Statute of Limitations because suit was not filed within two years from the date of the occurrence and that the longshoreman could not maintain his action under the Jones Act.

The basis for Federal jurisdiction in the District Court is its general jurisdiction of admiralty cases and its jurisdiction over actions brought under the Jones Act (Sec. 20, 46 USCA, Sec. 688).

REASONS FOR GRANTING THE WRIT.

I.

THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER ON THE QUESTION PRESENTED FOR REVIEW.

The Lower Courts, both Circuit and District, have and are rendering decisions in direct conflict with each other on the question whether a longshoreman—or harbor worker—may bring an action under the Jones Act for personal injuries sustained aboard ship.

As an example of the varied and opposite conclusions reached by the Lower Courts, and keeping in mind that the exclusive liability features of the Longshoremen's and Harbor Workers Act, 33 USCA 905, applies not only to longshoremen but also to harbor workers, we submit the following cases:

Circuit Courts.

First Circuit: In *Grimes* v. *Raymond*, 245 Fed. (2) 437 (1957), the Court held that a pile driver, a member of the Pile Drivers Union, who was injured while working on a Texas Tower, was NOT a seaman within the meaning of the Jones Act. The Supreme Court reversed and remanded in 356 US 252.

In *American Sugar Refining Co.* v. *Nassif*, 45 Fed. (2) 321 (1930), a laborer who was in the hold of a vessel unloading sugar was held to be a seaman within the meaning of the Jones Act.

Second Circuit: *Braen* v. *Pfeifer*, 263 Fed. (2) 147 (1959), held that a mate on a ship who was hurt while repairing another barge COULD NOT SUE under the Jones Act and was limited to the Longshoremen's and Harbor Worker's Compensation Act. The Supreme Court granted Certiorari in 395 US 952.

Oroz v. *American President Lines*, 259 Fed. (2) 636 (1958), held a longshoreman could NOT bring his action under the Jones Act. Certiorari was denied in 359 U.S. 908, but it appeared that the action had been filed five years late.

Yet, in *McAfoos* v. *Canadian Pacific Steamship*, 243 Fed. (2) 270 (1957), relief under the Jones Act was afforded a magician's assistant who had been employed on a ship as an entertainer.

Third Circuit: The case of *W. J. McCahan* v. *Stofel*, 41 Fed. (2) 651 (1930) held that a stevedore injured while unloading sugar from a ship, is a seaman with all his peculiar rights and immunities.

Fourth Circuit: *De Wald* v. *B. & O. Railroad*, 71 Fed. (2) 810 (1934) took the opposite view in stating that a bargeman who supervised the loading and unloading of cargo from barges to steamships and vice versa, was not a member of the crew.

Fifth Circuit: In *Gianfala* v. *The Texas Co.*, 350 US 879 (1955), the Supreme Court reversed a decision of the Fifth Circuit in

Texas Co. v. *Gianfala*, 222 Fed. (2) 382, which had refused to sustain a lower court judgment in favor of a driller who had been unloading tubing from a barge. The action of the Circuit Court in holding the driller to be a member of the drilling crew and not a member of the ship's crew was reversed by the Supreme Court and the judgment in the lower court was reinstated.

Harris v. *Whiteman*, 243 Fed. (2) 563 (1957), held that a laborer on an hourly wage basis who was working on a "dead" ship where no steam had been raised for a year and where there was no crew, was not a seaman under the Jones Act. However, the Supreme Court in *Butler* v. *Whiteman*, 356 US 271 (1958), reversed and remanded for trial.

The case of *Arthur* v. *Compagnie General*, 72 Fed. (2) 662 held that a stevedore could sue under the Jones Act.

Panama Agencies v. *Franco*, 111 Fed. (2) 263 (1940) also held that a stevedore is a seaman under the Jones Act.

The much discussed case of *Offshore Company* v. *Robison*, 266 Fed. (2) 769 (1959), contains a review of most of the cases on the subject and comes to the conclusion that it is the province of the jury to determine who are seamen under the Jones Act. This Fifth Circuit Court

permitted the jury to determine whether an oil field worker who was injured on a mobile drilling platform resting on the bottom of the Gulf of Mexico could bring his action under the Jones Act.

Sixth Circuit: In *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 Fed. (2) 383 (1953), certain laborers who were injured on a dredge boat were given a right of action under the Jones Act. One Justice dissented.

Seventh Circuit: The prime example which we can quote from the Seventh Circuit is the instant case appealed from. *Kyles* v. *Elwell*, 296 Fed. (2) 703, where the Court refused to permit Claude Kyles, a stevedore, from pursuing his action under the Jones Act for injuries sustained while working in the hold of a vessel.

Ninth Circuit: The case of *Hammond Lumber Co.* v. *Sandin*, 17 Fed. (2) 760, although decided in 1927 about the time that the Longshoremen's Act became effective, held that a stevedore is a seaman under the meaning of the Jones Act.

District Courts.

The District Court for the Eastern District of Pennsylvania held that a stevedore was NOT a seaman within the meaning of the Jones Act. *Kwasizur* v. *Dawnic*, 25 Fed. Supp. 327 (1938).

The District Court for the Western District of Washington, Northern Division, held that a mechanic, car-

penter and handyman engaged to reconstruct a vessel prior to a voyage was NOT a seaman entitled to a lien for wages. *The Enos*, 24 Fed. Supp. 387 (1938).

The District Court for the Southern District of New York in the case of *Bernardo* v. *Bethlehem Steel Co.*, 169 Fed. Supp. 914 (1959), held that the question of whether a welder who had been paid workman's compensation under the New York Compensation Act could sue under the Jones Act for injuries sustained while working on a dry dock which was out of commission was one for the jury.

II.

THE SUPREME COURT HAS NOT PRECISELY DECIDED THE QUESTION PRESENTED FOR REVIEW.

The gist of the defense argument seems to be that the decision of the Supreme Court in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50 (1926), that a stevedore can recover under the Jones Act, is no longer the law because the Longshoreman's and Harbor Workers Compensation Act, 33 USCA 901-942 (1927) gave a compensation remedy as the exclusive action which could be filed by a longshoreman for injuries sustained aboard ship.

Essentially, our point is this: we merely seek an opinion of this Court on the simple question of whether a longshoreman may sue a ship owner under the Jones Act for personal injuries sustained on board ship. At first blush it would appear that this question must have been decided many times. Yet, not since the *Haverty* decision has there been a clear-cut definite statement on this proposition.

Defendants contend that the Haverty opinion has been superseded by the Longshoremen's and Harbor Workers

Compensation Act, 33 USCA 901 (1927) and that now the question should be answered in the negative.

True, there have been opinions which seem to indicate an answer, but nowhere can we find a direct statement that a longshoreman may—or may not—proceed under the Jones' Act for shipboard injuries.

In 1946 the Supreme Court held that a longshoreman who received injuries "while working on a pier—on shore" could not file his suit under the Jones Act. *Swanson* v. *Marra Bros.*, 328 US 1.

On the very same day, the Supreme Court rendered its opinion in the case of *Seas Shipping* v. *Sieracki*, 328 U.S. 85, which directly gave a right of action in favor of a stevedore for injuries sustained because of the unseaworthiness of a vessel—this in spite of the exclusive provisions of the Longshoremen's and Harbor Workers Act. 33 USCA 905.

Although the *Sieracki* opinion does not specifically say so, we submit the language used there applies not only to the longshoreman's right to recover for unseaworthiness of the vessel, but the plain wording of the opinion unmistakably makes the Jones Act a remedy available to the longshoreman:

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under *statutory liability* within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and *statutory* protections, regardless of the fact that he is employed immediately by another

than the owner. For these purposes he is, in short, *a seaman because he is doing a seaman's work and incurring a seaman's hazards.* Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship." (Emphasis Supplied) (pp. 99) 328 U.S. 85.

The *Sieracki* opinion is quoted at some length in *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953) and the Court here came to the conclusion that Charles Hawn, a carpenter employed by an independent contractor, could sue the ship owner not only for unseaworthiness, but for its maritime tort, and the Court refused to permit defendant to avail itself of its defense of contributory negligence.

It is interesting to note that in the *Hawn* opinion both the concurring opinion of Mr. Justice Frankfurter (pg. 414), and the dissenting opinion of Justices Jackson, Reed and Burton (pg. 419) recognize that the Jones Act is being applied—although the majority opinion does not specifically say so—to afford the carpenter Charles Hawn, his recovery.

We would interpolate here that although Hawn was not a longshoreman, still he certainly must be considered a harbor worker under the plain language of the title Longshoremen's and Harbor Workers Act; and we respectfully submit that if the Court applied the Jones Act to this carpenter as a harbor worker, it must necessarily follow that our present plaintiff, Claude L. Kyles, a longshoreman, is also entitled to the same relief.

In a case not involving personal injuries, this Court has given a stevedoring company the benefit of the Jones Act, *Puget Sound Co.* v. *Tax Commission*, 302 US 90 (1937).

The Court stated on page 92 of the opinion: "The Longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purpose of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a 'seaman'". Citing *International Stevedoring Co.* v. *Haverty*, 272 US 50.

CONCLUSION.

For the reasons cited in this Petition we respectfully pray that the Court grant its Writ of Certiorari.

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APPENDIX

COURT OF APPEALS OPINION.
296 F. (2) 703 (1961).

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 13380 SEPTEMBER TERM, 1961 SEPTEMBER SESSION, 1961

CLAUDE L. KYLES,
Plaintiff-Appellant,
v.
JAMES W. ELWELL & CO., a corporation, G. HEYN & SON:, and INTERSTATE CONTRACTING CORPORATION, a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 8, 1961

Before HASTINGS, *Chief Judge*, CASTLE and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Plaintiff, Claude L. Kyles, brought suit against James W. Elwell & Company and G. Heyn & Sons, the berthing agent and owner, respectively, of the ship Bally Gally Head, for personal injuries. In the same suit he joined Interstate Contracting Corporation under a separate paragraph of complaint. Plaintiff alleges that during his employment as a longshoreman by Interstate a load of steel tipped while he was working in the hold of the ship on July 26, 1957, causing him to fall on the floor and from which fall he received serious and

permanent injuries. He further alleges the ship was at the time docked at a pier on a navigable waterway in Chicago.

Plaintiff alleges in Count I of his complaint, which was filed February 1, 1960, negligence on the part of Elwell and Heyn and bases his action on the Jones Act. (46 U.S.C. 688). He also complains of these defendants in Count II and alleges that the ship was unseaworthy. In Count III he alleges that he was not furnished a safe place to work by defendant Interstate and charges liability under the Jones Act.

The District Court granted the motion of defendants Elwell and Heyn for summary judgment and the motion of defendant Interstate to dismiss. This appeal followed.

Count I

Plaintiff contends that a longshoreman performing seaman's duties on board a ship in navigable waters is a seaman within the meaning of the Jones Act. He argues that until modern times members of the crew carried on the task of loading and unloading ships and only with the advent of large freighters and cargoes did it become necessary to engage longshoremen to carry on these operations. Among the cases plaintiff cites in support of his contention are *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 and *Pope & Talbot* v. *Hawn*, 346 U.S. 406.

In *Sieracki*, suit was brought against a shipowner by an employee of a stevedoring company for personal injuries which he received while loading the cargo. It is significant that Sieracki did not bring suit under the Jones Act but under the general maritime law. The Supreme Court held that a longshoreman who is performing a function essential to maritime service on board a ship must be accorded the same right as a seaman to sue for the ship's unseaworthiness. This decision is not questioned by defendants. However, plaintiff maintains that the language used by the Supreme Court in equating a longshoreman with a seaman for general maritime purposes may also be used

to equate a longshoreman with a seaman for Jones Act purposes.

On the same day that *Sieracki* was decided, the Supreme Court declined to follow its earlier decision in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, that a longshoreman performing the traditional duties of a seaman could sue his employer under the Jones Act. In *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, the Court held that a longshoreman injured while on a pier and engaged in loading cargo on a vessel had no right of recovery against his employer under the Jones Act. The Court interpreted the passage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, subsequent to its decision in *Haverty*, as an expression of Congressional intent in conflict with *Haverty*. In speaking of the Longshoremen's Act, Mr. Chief Justice Stone said, "The act thus excludes . . . stevedores not members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted by the *Haverty* case." In view of the doctrine expounded by *Swanson* that a longshoreman could not have recourse to the Jones Act in a suit against his employer, we fail to see how *Sieracki* is authority for allowing plaintiff to rely on the Jones Act in a suit against the shipowner who was *not* his employer. *Sieracki* does not abrogate the rule that the Jones Act applies only where the relationship of employer and employee exists. (*Continental Gas Co.* v. *Thorden Line*, 4 Cir., 186 F.2d 992).

Plaintiff also relies on *Pope & Talbot* v. *Hawn*, *supra*. In *Hawn* a carpenter, employed by an independent contractor, was injured while working on a ship on navigable waters in Pennsylvania. He brought suit based on diversity of citizenship in a federal district court alleging negligence and unseaworthiness. The negligence count was not founded on the Jones Act but was brought to recover as a business invitee for what is often described as "negligence of the ship." The Court held that the negligence action was rooted in federal maritime law and, consequently, the federal rule of comparative negligence rather

than the Pennsylvania rule of contributory negligence was properly applied.

Plaintiff cites language in the *Hawn* concurring opinion to the effect that the majority of the Court was allowing the plaintiff to have the alternative rights of an action for negligence which the Jones Act gives to crew members or unseaworthiness.

In our view, the Court did not imply that Hawn was a seaman for Jones Act purposes. The holding was that in this common law negligence action, since the injury occurred on navigable waters and the plaintiff was working on a ship, the injured longshoreman would be entitled to the same rights as a seaman for purposes of classifying the alleged injury as a maritime tort to which the Pennsylvania law of contributory negligence would be inapplicable. This is far removed from holding that Hawn was a seaman, *i.e.*, a member of the crew, for Jones Act purposes.

Cases cited by plaintiff, particularly *Offshore Co.* v. *Robison*, 5 Cir., 266 F.2d 769, in which it was left for the jury to decide whether crews of dredges, oil drilling vessels, and the like were seamen are not in point. We look to *Swanson* as the controlling precedent in determining that plaintiff was not a seaman within the meaning of the Jones Act.

Count II

Defendants Elwell and Heyn attacked Count II, based on unseaworthiness, because it was filed more than two years after the claim accrued. In support of his claim that the complaint was timely filed plaintiff cites *McAllister* v. *Magnolia*, 357 U.S. 221. In *McAllister* the Supreme Court held that when a seaman joins a count for unseaworthiness with a count based on the Jones Act the three-year Jones Act statute of limitation applies to both counts.

There is no statutory limitation period for the filing of a count based on unseaworthiness. However, the Illinois limitation on actions for personal injuries is two years.

(83 Ill. Rev. Stat. §15). When there is no statutory limitation period specified the courts are left with four choices according to Mr. Justice Brennan in *McAllister*: "(1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations."

In *McAllister* the Court did not need to resort to the comparable state statute since the unseaworthiness count was of necessity joined with the count under the Jones Act. As pointed out by the Court, a shorter state statute should not force a plaintiff to bring his Jones Act action sooner than the federal law requires. However, in the instant case we have concluded that plaintiff has no valid Jones Act claim. Consequently, since he has no right to the Jones Act remedy, he has no right to its limitation period. Accordingly, we must look elsewhere in deciding what time limit to impose.

Although laches is the proper measure of limitation, as a rule-of-thumb federal courts will use the local limitation statute in deciding the question of inexcusable delay. *Oroz v. American President Lines, Ltd.*, 2 Cir., 259 F.2d 636. Absent an explanation of the delay in filing or extenuating circumstances, we hold that the District Court, while not bound by the Illinois two-year limitation period, properly considered it in determining that plaintiff inexcusably delayed the filing of his complaint.

Count III

Finally, in Count III, plaintiff attempts to recover from his employer under the Jones Act. In addition to the prohibition placed on such an action by *Swanson*, the very terms of the Longshoremen's Act clearly preclude plaintiff's action against Interstate.

Interstate has fully complied with the requirements of the Longshoremen's Act. Plaintiff applied for and received temporary total disability payments and an action for partial permanent disability is pending before the Bu-

reau of Employees' Compensation of the Longshoremen and Harbor Workers. 33 U.S.C. 905 provides in part, "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to . . . maintain an action at law or in admiralty for damages. . . ."

Interstate's insurance carrier has signed an affidavit stating that the provisions of the Longshoremen's Act have been complied with and that the insurer is willing to pay any further compensation to which plaintiff may be entitled as a result of the pending administrative proceedings. The Longshoremen's Act provides plaintiff's exclusive remedy against his employer. *Conzo* v. *Moore McCormack Lines, Inc.*, 114 F. Supp. 956.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago 10, Illinois

Friday, December 8, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Latham Castle, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

Claude L. Kyles, *Plaintiff-Appellant*, vs. James W. Elwell & Co., a corporation, G. Heyn & Sons, and Interstate Contracting Corporation, a corporation, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13380

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

MERCHANT MARINE (JONES) ACT, SECT. 20, 46 U.S.C.A. Sec. 688.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under the sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury. Mar. 4, 1927, c. 509, P. 4, 44 Stat. 1926.-33 U.S.C.A. 904.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence or a fellow servant; nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. Mar. 4, 1927, c. 509, P. 5, 44 Stat. 1426.

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SUPREME COURT, U. S.

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OCTOBER TERM, 1961.

No. 781

CLAUDE L. KYLES,

Petitioner,

vs.

JAMES W. ELWELL & CO., a corporation, G. HEYN & SONS, and INTERSTATE CONTRACTING CORPORATION, a corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 781

CLAUDE L. KYLES,

Petitioner,

vs.

JAMES W. ELWELL & CO., a corporation, G. HEYN & SONS, and INTERSTATE CONTRACTING CORPORATION, a corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

The judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the decision of the District Court was and is correct. There is no special or important reason for this Court to review that judgment, and the petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE.

On July 27, 1957 the petitioner, a longshoreman, was an employee of Interstate Contracting Corporation (an independent stevedoring contractor) and was engaged in moving cargo in the hold of a vessel with a fork lift truck. Some steel which the longshoremen had placed on this

truck tipped, thereby causing the plaintiff to fall off of the fork lift truck onto the floor of the vessel, to sustain a very minor injury which resulted in his losing two and six-sevenths weeks of work, for which he was paid compensation in the sum of $154.29 at the rate of $54.00 per week under the provisions of the Longshoremen's & Harbor Workers' Compensation Act.

The complaint was filed more than two years after the occurrence on the theory that the plaintiff is a seaman entitled to the benefits of the Jones Act. The defendants were James W. Elwell & Co., berthing agent of the vessel, G. Heyn & Sons, vessel owner and Interstate Contracting Corporation, the petitioner's employer. Benefit of the Jones Act was claimed as against all three of these defendants, but the motions for summary judgment pointed out that the complaint itself showed that plaintiff was a longshoreman both by definition and nature of his work, that he was not an employee of either Elwell or Heyn and that the Jones Act is inapplicable because that Statute gives a cause of action for negligence only in favor of seamen-crew members (who engage in navigation) and then only against their own employers. The District Court granted summary judgment in favor of the defendants Elwell and Heyn, and dismissed the complaint as to the petitioner's employer Interstate. The Petition for Certiorari does not seek review of the decision as to Interstate; and as to Elwell and Heyn the question presented for review is limited to "Whether a stevedore may sue a ship owner for personal injuries sustained on board ship under the Merchant Marine (Jones) Act, Sec. 20, 46 U.S.C.A., Sec. 688."

ARGUMENT.

Petitioner is not a Jones Act seaman; there is no conflict among the decisions of the lower courts on the question presented for review.

This case should never have been filed at all, much less accorded the dignity of a petition for certiorari. It involves only a minor accident on board a vessel which was being unloaded by an independent stevedore contractor, where the contractor had full charge of the operation, and in which there was no fault of the vessel or its personnel.

The petition for certiorari is inaccurate and misleading in the extreme:

1. The "Statement of the Case" asserts that a "load of steel tipped and fell upon him" (petitioner). This is not true, as shown by the petitioner's pleadings.

2. Under "Reasons for Granting the Writ" the petitioner asserts (p. 3) that the lower courts are in conflict on the question presented for review. An analysis of the cases cited by the petitioner demonstrates that this is inaccurate.

3. The Petition alleges (p. 8) that the Supreme Court has not decided the question presented for review. That assertion is also false.

Beginning at page 4 the Petition cites seventeen decisions for the proposition that the lower courts have been rendering decisions in direct conflict with each other on the question whether a longshoreman may bring an action under the Jones Act for personal injuries sustained aboard ship. These citations may be conveniently divided into

two categories: (a) twilight zone marine workers such as crews of dredges, oil-drilling vessels and miscellaneous craft who alleged in their complaints that they were crew members, wherein the facts were such as to allow the question of whether or not they were seamen to be submitted to a jury, and (b) accidents of longshoremen which occurred prior to the date that the Longshoremen's & Harbor Workers' Compensation Act (33 U.S.C.A. 901-942) went into effect in 1927, when the courts said that longshoremen were seamen under *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19 (1926), which case is no longer applicable.

It seems quite unnecessary to analyze the petitioner's citations relating to the borderline jury-made seamen because the petitioner *is* a longshoreman by definition in his complaint and the Longshoremen's Act has provided a compensation remedy in lieu of the Jones Act. There are no questions of fact as to petitioner's status such as were involved in those cases and in *Senko* v. *La Crosse Dredging Corporation*, 352 U. S. 370, 77 S. Ct. 415, at 417-418. But the authorities which petitioner cites for the proposition that *longshoremen* are Jones-Act seamen will now be mentioned and explained.

A laborer unloading sugar was injured September 11, 1926 so the *Haverty* case was applied in *American Sugar Refining Co.* v. *Nassif*, 45 F. 2d 321, 1 Cir. (1930).

A longshoreman injured on some date before January 9, 1927 was accorded Jones Act recovery in *W. J. McCahan* v. *Stoffel*, 41 F. 2d 651, 3 Cir. (1930).

Panama Agencies Co. v. *Franco*, 111 F. 2d 263, 5 Cir. (1940) held that in the Canal Zone, where the Longshoremen's Act was not applicable, a longshore-

man could recover under the Jones Act pursuant to the *Haverty* decision.

The petition for certiorari at page 7 says that *Hammond Lumber Co.* v. *Sandin*, 17 F. 2d 760, 9 Cir. (1927) "although decided in 1927 about the time that the Longshoremen's Act became effective, held that a stevedore is a seaman under the meaning of the Jones Act." Actually both the occurrence (precise date not shown in the opinion) and the decision (February 14, 1927) were *before* the Longshoremen's Act was passed by Congress (March 4, 1927).

Arthur v. *Compagnie Generale Transatlantique*, 72 F. 2d 662, 5 Cir. (1934) is another Canal Zone case and therefore inapplicable to the case at bar.

Kwasizur v. *Dawnic, S.S. Co.*, 25 F. S. 327, D.C.E.D. Penn. (1938) points out that the Jones Act gives the employee no rights against a third person, not his employer. The opinion does state that stevedores have been held to be entitled to benefits of the Jones Act by a somewhat artificial extension of the word seamen, but that *Uravic* v. *Jarka Co.*, 282 U. S. 234, 51 S. Ct. 111 (1931) was careful to point out that stevedores are not to be regarded as seamen on the particular vessel upon which for the moment they happen to be at work. We must also mention that *Uravic* v. *Jarka* which talked of longshoremen as Jones Act seamen was a case in which the injury occurred on July 13, 1926, prior to passage of the Longshoremen's Act, and the case no longer states the law as to longshoremen being seamen.

Braen v. *Pleiter*, 263 F. 2d 147, 2 Cir. (1959) is cited by the petitioner (p. 5) to show "conflict" of decisions as to status of marine workers. Petitioner

fails to cite the final decision of this Court in that very case (361 U. S. 129, 80 S. Ct. 247) which pointed out that the employee was a "mate", that his status as a seamen was not involved, that the only question was whether he was injured "in the course of his employment." The opinion of Mr. Justice Douglas as to seaman status is as follows, (80 S. Ct. at p. 249):

> "The injured party must of course have 'status as a member of the vessel' for it is seamen, not others who may work on the vessel (*Swanson* v. *Marra Bros.*, 328 U.S. 1, 4, 66 S. Ct. 869, 871, 90 L. Ed. 1045), to whom Congress extended the protection of the Jones Act."

The question presented for review has been settled by the United States Supreme Court.

The petition asserts at page 9 that a direct statement whether a "longshoreman may—or may not—proceed under the Jones Act for shipboard injuries can not be found," and petitioner brushes off *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 S. Ct. 869 (1946) with the comment that the longshoreman who was there denied Jones Act benefits received his injuries "while working on a pier—on shore." Now actually, under the Jones Act it makes no difference whether the accident occurs on shore or one navigable water, *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 63 S. Ct. 488 (1943). Even a casual reading of *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 S. Ct. 869 clearly reveals that *Haverty* no longer applies, that the Longshoremen's Act gave a compensation remedy for longshoremen and that longshoremen no longer have any rights under the Jones Act, afloat or ashore (66 S. Ct. at p. 871). Mr. Chief Justice Stone referring to the Longshoremen's Act in *Swanson* v. *Marra Brothers, Inc.*, said p. 871:

> "The Act thus excludes stevedores not members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted in the *Haverty* case."

Thus obviously the question presented for review has been decided by this Court. It was confirmed as recently as December 1959 by the opinion of Mr. Justice Douglas in *Braen* v. *Pfeifer Oil Transportation Co.*, 361 U. S. 129, 80 S. Ct. 247 at p. 249. Also, there is a point not mentioned in the Petition but likewise fatal to petitioner's arguments, namely, that the Jones Act provides for suit against the employer only, *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 69 S. Ct. 1317 at 1321-1322 (1949).

CONCLUSION.

Petitioner is a longshoreman by his own definition and by the nature of his work; he had no navigational duties, was not a crew member; he petitions for a determination that the Jones Act applies to longshoremen, and his petition is pitched upon the proposition that lower court decisions are in conflict and that the Supreme Court has never decided the question presented for review. Those assertions in the petition are manifestly untrue. The opinion of the Court of Appeals in *Kyles* v. *Elwell, et al.*, 296 F. 2d 703, the case at bar, was a thorough, well reasoned decision which strictly followed the law as laid down in the applicable decisions of this Court. The Petition for Certiorari should be denied.

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